FIRST NOMINEE (PTE.) LTD. v. NEW KOK ANN REALTY SDN. BHD. & ANOR.

[O.C.J. (Yusoff Mohamed J.) January 20, 1982]

[Singapore – Originating Motion No. 1 of 1980]

Company Law – General Meeting to increase share capital – Notice sent 3 days short of length of service required – Insufficient notice – Whether meeting ineffective – Principles guiding Court – Scope of Companies Act 1965, s. 355 – Australian Companies Act 1961, s. 366 – Companies Act 1965, ss. 162 & 355.

The applicant sought for an order that the register of members of the 1st respondent (the company) be rectified by striking out the name of the 2nd respondent therefrom as the holder of the 1,000 shares of the company and that notice of such rectification be given to the Registrar of Companies.

The company was incorporated on December 1, 1971 with an authorized capital of $3,000,000 in 30,000 shares of $100 each. On December 30, 1978, 25,000 shares were issued. The applicant held 12,859 shares, the majority shares, and the 2nd respondent held 12, 139 shares. On February 6, 1979, the company convened a general meeting and passed a resolution to increase the capital of the company by another $100,000 in 1,000 shares of $100 each. The new shares were to rank *pari passu* with the existing ones to be issued at par to the existing shareholders in proportion to its shareholdings as at February 6, 1979. Based on that resolution, the applicant was purported to have been allotted with 510 new shares and the 2nd respondent with the remaining 490 shares. The applicant purportedly having failed to subscribe for the new shares, they were forfeited by the company and subsequently reallocated to the second respondent who, as a result, became the majority shareholder of the company.

The notice of the meeting was sent out but returned undelivered to the applicant. The notice was sent 11 days before the meeting was held and therefore, 3 days short of the length of service required by the Memorandum and Articles of Association of the Company.

The said notice was defective for being insufficient notice, and accordingly the meeting was ineffective and the resolutions passed thereat was invalid unless it was saved by a validation order under section 355 of the Companies Act 1965 (the Act).

The applicant averred that it was not given the notice of meeting and accordingly it was not represented at the said meeting. It alleged irregularities and in particular that the issue of 1,000 new shares to the 2nd respondent was improper and unlawful, designed to gain majority control over the affairs of the Company by the second respondent.

Held, allowing the application: (1) the criteria in exercising discretion is for the court to satisfy itself that any such order would not do injustice to the company or to any member or creditor thereof – section 355(3)(b) of the Act;

(2) prejudice is not the criterion, justice is, and that justice may require that the prejudice to one party if the order were made be balanced against the respective prejudice to other parties if the order were not made;

(3) in this case, the absence of a proper notice to the applicant both in regard to the general meeting as well as the forfeiture of the purported new shares allotted to it, had substantially prejudiced its position in the company as a majority shareholder. This had caused injustice to the applicant. On the balance of respective prejudice, a validating order should therefor not be made.

Editorial Note: An appeal was made to the Federal Court against the above decision (Federal Court Civil Appeal No. 42 of 1982) but the appeal has since been withdrawn.

Cases referred to:

(1) *Holmes* v. *Life Funds of Australia Ltd.* (1971) 1 N.S.W.L.R. 860 @ p. 865.

(2) *Mansfield* v. *N.S.W. Leagues' Club Bowling Club Ltd.* (1963) 80 W.N. (N.S.W.) 1407.

(3) *Re Australian Continental Resources Ltd.* (1975) 1 A.C.L.R. 405 @ p. 417.

CIVIL SUIT.

Tommy Thomas for the applicant.
V.C. George for 1st and 2nd respondents.

Cur. Adv. Vult.

Yusoff Mohamed J.: The applicant, First Nominees (Pte.) Ltd. seeks an order pursuant to section 162 of the Companies Act, 1965 (Revised 1973) that the Register of members of the 1st respondent's company be rectified by striking out the name of the 2nd respondent therefrom as the holder of the 1,000 shares of the 1st respondent's company and that notice of such rectification be given to the Registrar of Companies.

In its affidavit supporting the motion sworn by Choh Yet, a director of the applicant, it is stated that the 1st respondent, the New Kok Ann Realty Sdn. Bhd., (the Company) was incorporated on December 1, 1971 with an authorized capital of $3,000,000 divided into 30,000 shares of $100 each. As on December 30, 1978, 25,000 shares were issued, the applicant holding 12,859 shares, the majority shares, and South Johore Amalgamated Holdings Bhd. (2nd respondent) 12,139 shares.

The company owned several parcels of land which were charged to the Moscow Norodny Bank. It intended to take legal proceedings against the bank and it was estimated that it would cost the company in the region of $100,000 to pursue the matter. On February 6, 1979, it convened a general meeting and passed a resolution to increase the capital of the company by another $100,000, in

1,000 shares of $100 each, and that the new shares to rank *pari passu* with the existing ones to be issued at par to the existing shareholders in proportion to its shareholdings as at February 6, 1979. Based on that resolution, the applicant was purported to have been allotted with 510 new shares and the second respondent with the remaining 490 shares. The applicant purportedly having failed to subscribe for the new shares they were forfeited by the company and subsequently reallocated to the second respondent who as a result became the majority shareholder of the company.

The applicant averred that it was not given the notice of the meeting and accordingly it was not represented at the meeting of February 6, 1979. It alleged irregularities and in particular that the issue of 1,000 new shares to the second respondent was improper and unlawful, designed to gain majority control over the affairs of the company by the second respondent.

Upon evidence adduced by affidavits by the respondents, it transpired and it was conceded by the applicant that the notice of the meeting had been sent out but returned undelivered to the applicant. It was also conceded by the respondents that the notice was sent 11 days before the meeting was held and in that event the notice was 3 days short of the length of service required by the Memorandum and Articles of Association of the Company which specified 14 days.

As conceded, the notice convening the meeting of February 6, 1979 was defective for being insufficient notice, and accordingly the meeting was ineffective and the resolution passed thereat invalid unless it is saved by a validation order under section 355 of the Companies Act, 1965. There has been no application for such order but the court on its own motion may make such an order as it thinks fit – section 355(3). The section provides:–

"355. (3) Without affecting the generality of subsection (1) and subsection (2) or of any other provision of this Act, where any omission defect error or irregularity (including the absence of a quorum at any meeting of the company or of the directors) has occurred in the management or administration of a company whereby any breach of this Act has occurred, or whereby there has been default in the observance of the memorandum or articles of the company or whereby any proceedings at or in connection with any meeting of the company or of the directors thereof or any assemblage purporting to be such a meeting have been rendered ineffective including the failure to make or lodge any declaration of solvency pursuant to section 257, the court:–

(a) may, either of its own motion or on the application of any interested person, make such order as it thinks fit to rectify or cause to be rectified or to negative or modify or cause to be modified the consequences in law of any such omission defect error or irregularity, or to validate any act matter or thing rendered or alleged to have been rendered invalid by or as a result of any such omission defect error or irregularity;

(b) shall before making any such order satisfy itself that such an order would not do injustice to the company or to any member or creditor thereof;"

Counsel for the respondents invited the court to make the validating order and urged that the discretion of the court under the section is wide and submitted that no injustice has been done to the applicant nor caused to the company.

There is no precedent on the application of section 355 of the Companies Act but on similar legislation in Australian Companies Act, 1961, the relevant section 366 is *in pari materia* with our section 355. The court there strictly construed the provision particularly where the irregularity involves a derogation from the rights of a person before allowing the section to operate, in order to validate the defective proceedings of the company. The criteria in exercising discretion is for the court to satisfy itself that any such order would not do injustice to the company or to any member or creditor thereof – section 355(3)(b).

In *Holmes* v. *Life Funds of Australia Ltd.*[1] Street J. in evaluating the procedural justice or injustice in sub-section (3)(b) of the section held that when determining the procedural justice or injustice attending the exercise of the court's discretion under section 366 (Australian), regard is to be had to the likelihood of prejudice to any individual member by reason of the defect or omission which took place. Where a company's general meeting and election of directors was invalid for want of proper notice, the court ruled that section 366 was not apt to cure the defect – *Mansfield* v. *N.S.W. Leagues' Club Bowling Club Ltd.*[2]

In evaluating the applicability of this section, the court is entitled to admit into evidence any facts which are relevant to the exercise of its discretion, – *Re Australian Continental Resources Ltd.*[3]. In the present case, the notice convening the general meeting was 3 days deficient of the required period which resulted in non-attendance of the meeting by the applicant. This was followed by the call for payment of the new shares purportedly allotted to the applicant at the meeting and the subsequent forfeiture of these shares allotted to

the applicant had derogated him to a minority shareholder in the company. These are not insubstantial losses to the applicant of his rights in the company.

In *Re Australian Continental Resources Ltd.*, it has been said that the exercise of discretion provided in section 366(3) (Australian), implies a consideration of the relative gains or losses of the parties involved. Prejudice is not the criterion, justice is, and that justice may require that the prejudice to one party if the order were made be balanced against the respective prejudice to other parties if the order were not made.

It would appear in this case that the absence of a proper notice to the applicant both in regard to the general meeting as well as the forfeiture of the purported new shares allotted to it, has substantially prejudiced its position in the company as a majority shareholder. This has caused injustice to the applicant. In the event I am of the view that on the balance of respective prejudice, a validating order should not be made and I should grant the application sought above, in terms with costs.

Application allowed.

Solicitors: *Skrine & Co.; Ng Ek Teong & Partners.*

ABDUL RAHIM v. ABDUL HAMEED & ANOR.

[O.C.J. (Yusoff Mohamed J.) September 11, 1982]

[Johore Bahru – Originating Summons No. 101 of 1981]

Islamic Law – Will – Disposal of estate – Delay in vesting of estate – Rule of perpetuity

This was an application to declare invalid a provision of a Will by a deceased Muslim, Rahiman Sahib s/o Oosainsa Rowther. By Clause 7 of his Will the deceased provided:

"I declare and direct that twenty-one (21) years after the death of the last survivor of my children my Trustees are to wind up my said business and to sell call in and convert into cash every other property real and personal estate of whatsoever nature and wheresoever situate and to divide the proceeds of such sale calling in and conversion into nine (9) shares and to appropriate such shares as follows:–"

Held: (1) in Islamic Law, a testator has power to dispose of not more than one-third of his estate and the residue descends in fixed proportions unless the heirs consented;

(2) a testator cannot delay the vesting of his estate in his heirs;

(3) The rule of perpetuity is not applicable in relation to disposition of property by Muslims in the State of Johore, but clause 7 of the Will in question could not be valid as it infringed the provisions of Islamic Law.

Cases referred to:

(1) *Estate of Rahiman Sahib s/o Oosainsa Rowther* [1983] 1 M.L.J. ccxiii.

(2) *Shaik Abdul Latif* v. *Shaik Elias Bux* (1915) 1 F.M.S. LR. 204.

(3) *Saeda* v. *Hj. Abdul Rahman* (1918) 1 F.M.S.L.R. 352.

(4) *Koh Cheng Seah* v. *Syed Hassan bin Ahmad Al-Attas & Anor.* (1930) 1 M.C. 180.

CIVIL SUIT.

Elyas Majeed for the applicant

Cur. Adv. Vult.

Yusoff Mohamed J.: This is an application to declare invalid a provision of a Will of a deceased Muslim, Rahiman Sahib s/o Oosainsa Rowther dated July 10, 1939 and a Codicil dated June 18 1947 annexed, relating to disposition of his properties.

The applicant is one of the executors and trustees of the deceased's estate. The remaining two executors, Abdul Hameed and Abdul Majeed have consented to this application in writing and have renounced their rights and titles to this Probate. The Probate was granted by Singapore High Court in August, 1951 and has been resealed in the Supreme Court (High Court) at Johore Bahru on September 30, 1953.

The deceased was a Muslim of Sunite Sect belonging to the School of Hanafi. His will devised and bequeathed the whole of his properties consisting of various pieces of land in Malaya and two businesses, one at Johore Bahru and another at Kota Tinggi, Johore. Clause 7 of the Will provides that:–

"I declare and direct that twenty-one (21) years after the death of the last survivor of my children my Trustees are to wind up my said business and to sell call in and convert into cash every other property real and personal estate of whatsoever nature and wheresoever situate and to divide the proceeds of such sale calling in and conversion into nine (9) shares and to appropriate such shares as follows:–"

and clause 3 of the Codicil states:–

"... for the reason stated in clause 2 Supra I hereby substitute "Seven (7) shares" in the place of "nine (9) shares" appearing in the eighth line of clause 7 (seven) of my said Will; and revoke and delete the whole of sub-clause 7(i) of my said Will."